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No. 06-1438

In The
Supreme Court of the United States

PAUL HUDSON, JULIE PARSLEY, AND BARRY SMITHERMAN, as Commissioners of the Public Utility Commission of Texas, in their official capacities,
Petitioners,

v

AEP TEXAS NORTH COMPANY, ET AL.,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS ET AL. AMICI CURIAE BRIEF SUPPORTING PETITIONERS PAUL HUDSON, JULIE PARSLEY, AND BARRY SMITHERMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS

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QUESTION PRESENTED

Whether federal law preempts a State from interpreting a FERC-filed tariff where such interpretation is necessary for setting retail rates.

PARTIES TO THE PROCEEDING

The Parties to the proceeding before the Fifth Circuit follow:

Petitioners are Paul Hudson in his official capacity as the Chairman of the Public Utility Commission of Texas, Julie Parsley in her official capacity as Commissioner of the Public Utility Commission of Texas, and Barry Smitherman in his official capacity as Commissioner of the Public Utility Commission of Texas. Respondents are AEP Texas North Company; the Cities of Abilene, Ballinger, Cisco, San Angelo, and Vernon, Texas; and the Texas Industrial Energy Consumers.

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INTEREST OF THE *AMICI CURIAE*[1]

The National Association of Regulatory Utility Commissioners ("NARUC"), a quasi-governmental organization founded in 1889, submits this brief in support of Petitioners Paul Hudson, Julie Parsley and Barry Smitherman, Commissioners of the Public Utility Commission of Texas, in their official capacities. The Public Utility Commission of Texas ("PUCT") is one of NARUC's State commission members.

NARUC is the national organization of the State commissions responsible for economic and safety regulation of the retail operations of utilities. Specifically, NARUC's members have the obligation under State law to ensure the establishment and maintenance of such energy utility services as may be required by the public convenience and necessity, as well as ensuring that such services are provided at just and reasonable rates. NARUC's members include the agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the rates and terms and conditions of service associated with the intrastate operations of electric, natural gas, water, and telephone utilities.

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[1] Sup. Ct. R. 37.2(a) certification: NARUC has obtained the consent of all parties to file this brief. The letters of consent are on file with the Clerk of Court. Sup. Ct. R. 37.6 certification: This brief has not been authored in whole or in part by counsel for a party. No person or entity, other than NARUC, made a monetary contribution to the preparation and submission of this brief.

Both Congress[2] and the federal courts[3] have long recognized NARUC as the proper party to represent the collective interests of State regulatory commissions.

The Iowa Utilities Board, Public Service Commission of Wisconsin, Public Utilities Commission of the State of California, Vermont Department of Public Service and Public Service Commission of the State of New York are established by State Constitutions and/or the laws of their respective States. These Commissions exercise general regulatory jurisdiction over electric utilities and the provision of retail electric service, are charged to protect their State's citizens, and are authorized to represent them in proceedings before the Federal Energy Regulatory Commission (FERC) and courts reviewing FERC decisions.

The Attorneys General of the States of Minnesota North Dakota and Colorado are charged with representing the States of Minnesota and Colorado in all matters in

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[2] See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Boards to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns); Cf., 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC,* 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "...Carriers, to get the cards, applied to... [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system).

[3] See *United States v. Southern Motor Carrier Rate Conference, Inc.,* 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985).

which the State has an interest, including utility matters, and with representing the Minnesota Public Utilities Commission, North Dakota Public Service Commission and the Colorado Public Utilities Commission before federal and State courts.

NARUC's member commissions have a *vital* interest in whether this Court accepts the PUCT's Petition for a Writ of Certiorari.

The Fifth Circuit's decision is a significant threat to effective State regulation of retail rates. It preempts States, during retail ratemaking, from *applying* the unambiguous text of a federal tariff; requires States to interrupt proceedings to seek FERC clarification of the utility's construction of the tariff, *no matter how far it diverges from the statutory text*; and effectively gives a utility *carte blanche* to effectively stay State retail ratemaking procedures.[4] *Anytime* a utility disagrees with the State commission's *application* of the tariff - *even when the text is crystal clear* - under the 5th Circuit's decision, the *only* remedy is to stop the proceeding and seek FERC's view of the disputed provision (or for the State commission to yield to the utility's arguments).[5] This result is an invitation to waste both federal and State resources and delay critical State proceedings.

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[4] See *AEP Texas North Co. v. The Public Utility Commission of Texas*, 473 F.3d 581 (5th Cir. 2006).

[5] This turns the ordinary progress of appeals in this context on its head. Ordinarily, the States can finish their proceedings *before* facing an appeal and perhaps a primary jurisdiction referral of the disputed text to the FERC. Under the 5th Circuit's formulation, practically, the utility is given significant leverage as the State commission cannot disagree with any utility construction of a tariff without potentially facing an injunction to *permanently* stay its proceedings.

The extraordinarily inefficient and impractical procedure mandated also runs contrary to the well-recognized division between State and federal regulatory authority.[6]

The Federal Power Act and its legislative history clearly demonstrate that Congress, when it granted FERC jurisdiction over wholesale sales of electricity and the transmission of electric energy in interstate commerce, expressly reserved jurisdiction over all retail sales of electric energy to the States.

Although the FERC has exclusive jurisdiction to establish wholesale rates and allocate interstate costs, the federalized nature of electricity regulation unavoidably requires States exercising retail rate jurisdiction to routinely *apply* federally filed tariffs. That is all the Texas commission has done here. States set rates to allow utilities to recover reasonable expenses, and the only reasonable amount for a wholesale cost set by a federal tariff is the rate specified in the tariff. In this case, the court of appeals' decision prevents the State agency from looking to the

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[6] See, *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (FERC authority over wholesale sales of electric energy in interstate commerce is clear, as is this Court's acknowledgement of State authority over retail sales). *Id.* at 377-380. *New York v. FERC*, 535 U.S. 1, 23 (2002) ("Because federal authority has been asserted only over unbundled *transmissions*, New York retains jurisdiction of the ultimate sale of the *energy*."). Even when discussing the central principles of preemption in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) and *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988), this Court recognized that the jurisdiction of States over retail rates is indisputable. *Nantahala* 476 U.S. at 970, *cited in Mississippi Power*, 487 U.S. at 372.

federal tariff to determine what rate has been mandated. It is impossible for the PUCT to adhere to the filed rate doctrine and apply the FERC approved tariff in a retail rate proceeding without ascribing some meaning to the text.

The Fifth Circuit's decision establishes a procedure that invites industry manipulation, delay and inefficiency – at ratepayer expense. Reversal of that decision will discourage such manipulation. By conditioning enforcement of facially unambiguous provisions in retail rates on the delays inherent in FERC contested case proceedings, the Fifth Circuit's holding also effectively robs States of any meaningful authority to exercise a key police power in violation of the Federal Power Act.

STATEMENT OF THE CASE

Mindful of the admonitions of U.S. Sup. Ct. Rule 37, NARUC adopts by reference the Statement of the Case presented in the PUCT's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT IN FAVOR OF GRANTING THE WRIT

This Court in *Entergy*[7] expressly reserved the question of the exclusivity of the FERC's jurisdiction to determine whether a filed tariff has been violated. The Fifth Circuit's holding that State commissions are preempted from finding a violation of a FERC-filed tariff misreads the *Entergy* decision. Moreover, it misapplies the *Nantahala* and *Mississippi Power* cases. In both decisions, State agencies disallowed costs assessed in compliance with a FERC tariff, contrary to the "filed-rate doctrine," which requires States to enforce federal tariffs. But the doctrine does not prevent a State agency from ascribing some meaning to the federal tariff so that State can correctly apply the terms of those tariffs.

The PUCT specifically *enforced* the provisions of the FERC-filed tariff. The AEP tariff's clear requirement that the calculation of Trading and Marketing Realizations include only "revenues collected" cannot be taken to provide discretion to include in that calculation "revenues *not* collected." Inclusion of revenues where none had been collected indisputably violated the terms of the FERC-filed tariff. In order to "give binding effect" to the tariff, the PUCT was *obligated* to reject TNC's suggested interpretation.

The Fifth Circuit's decision works against the principles of cooperative federalism by denying the States their proper role under the Federal Power Act. If the decision is allowed to stand State commissions will be forced to hold any proceeding in which a utility contests the

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[7] *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39, 51 (2003).

proposed interpretation of a FERC tariff in abeyance pending resolution of that dispute by FERC. By conditioning State control of retail rates on the delays inherent in FERC contested case proceedings, the Fifth Circuit's holding effectively robs States of meaningful authority to exercise one of their key police powers. This result is contrary to the well-recognized division between State and federal regulatory authority.

ARGUMENT IN FAVOR OF GRANTING THE WRIT

Mindful of the admonitions of U.S. Sup. Ct. Rule 37 concerning original material potentially helpful to the Court, NARUC, to avoid repetition, fully endorses the arguments presented in the PUCT's Petition for a writ. It is clear that (1) the Fifth Circuit reached and incorrectly decided the critical issue this Court reserved in its *Entergy* decision, (2) the Fifth Circuit's determinations will have broad impact and assure inefficient and expensive delay and manipulation of State and FERC administrative process; and (3) the Fifth Circuit decision misapplies prior Supreme Court precedent. Aside from this specific endorsement of the PUCT's arguments, NARUC also offers the following:

I. *The Determination That The PUCT Cannot Apply Unambiguous FERC-Approved Text In Retail Ratemaking Proceedings Is Inconsistent With The Supreme Court's Reasoning In Entergy.*

The Fifth Circuit purported to rely on this Court's decision in *Entergy*. But in that case, this Court expressly reserved the question resolved by the 5th Circuit - the exclusivity of the FERC's jurisdiction to determine whether

a filed tariff has been violated.[8] Clearly, the holdings of *Entergy* cannot directly support the Fifth Circuit's decision to preempt the PUCT's application of the FERC-approved unambiguous tariff terms. Moreover, a closer examination reveals that the *rationale* of the *Entergy* decision fails to support the decision below.

Unlike the circumstances presented in *Entergy*, in this case there is no comparable delegation of discretionary authority to AEP. That alone distinguishes the present case from *Entergy*. Furthermore, any implied delegation of authority to AEP that may exist undoubtedly *did not* include permission to adopt a methodology that is *clearly at odds with the express text FERC approved in the tariff.*

Rather than supporting the *Entergy*'s interest in assuring the FERC determinations are respected, the Fifth Circuit's decision has precisely the opposite impact. As Petitioners argue, Petition at 9, a State might choose to acquiesce in a clearly erroneous industry interpretation rather than face the delays associated with immediate FERC review – defeating the primary purpose of the "filed rate" doctrine. Moreover, where, as here, the tariff text is clear, actions that prevent other authorities from applying or enforcing FERC's decisions can only undermine compliance.

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[8] *Entergy*, 539 U.S. at 51. Nor do *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) or *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) support the 5th Circuit's findings. Neither case involves a claim that a utility *breached* the terms of a FERC-filed tariff. Rather both involved efforts by State agencies to disallow costs assessed *in compliance* with FERC tariffs.

II. The PUCT Applied the Unambiguous Tariff Text to Reverse an Obvious Utility Distortion That Blatantly Ignores FERC Requirements.

Delay of the State retail ratemaking to obtain, *ab initio,* guidance from the FERC is notably inappropriate in this case. The language of the tariff is clear on its face. The FERC-approved tariff, the System Integration Agreement ("SIA"), plainly excludes the interpretation offered by AEP Texas North Company ("TNC").

The filed rate doctrine *requires* the PUCT to apply and enforce the FERC-filed SIA in TNC's fuel reconciliation proceeding. The PUCT was obligated to review the tariff to ensure its orders complied with FERC's decisions. This particular SIA requires AEP Service Corporation ("AEPSC"), the agent for the AEP System, to calculate and distribute Trading and Marketing Realizations between the two system zones according to a specific formula. Section 1.39 of the SIA plainly defines "Trading and Marketing Realizations" as:

> the difference between (i) <u>revenues collected</u> from Trading and Marketing activities and (ii) the Out-of-Pocket Cost of such Trading and Marketing Activities and any transmission cost related to such activities. {Emphasis Added}

In performing the calculation described in the SIA, AEPSC was obligated to include only those off-system sales revenues <u>actually collected</u> by the system. *Instead, AEPSC included the values of certain "open" transactions for which no revenues had yet been received.* TNC does not dispute this, but instead asserts its inclusion of *uncollected revenues* as "*collected revenues*" is justified by AEPSC's use of mark-to-market accounting. However,

any construction of the filed tariff that treats "uncollected" revenues as "collected" clearly contradicts the express language FERC approved in the tariff.

The SIA's use of the phrase "revenues collected" simply cannot be interpreted to mean "revenues *not* yet collected." In order to "give binding effect" to the SIA in accordance with the filed rate doctrine,[9] the PUCT was *obligated* to reject TNC's suggested interpretation and to require TNC to calculate its share of margins without including the "open transactions".

III. *Cooperative Federalism Suggests Some Deference to States' Efforts to Comply with the "Filed Rate Doctrine" by Applying the Unambiguous Text of a FERC-Approved Tariff When Setting Retail Rates.*

The Fifth Circuit's decision is contrary to both the filed rate doctrine and the most basic principles of cooperative federalism.

Indeed, the most prominent feature of all the Supreme Court cases cited by the 5th Circuit is their absolute insistence that States implement and apply FERC approved tariffs as part of their retail rate making procedures.[10] This is precisely what the PUCT tried to do.

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[9] *See generally* *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), and *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988).

[10] *See Entergy*, 539 U.S. at 47 ("The filed rate doctrine requires 'that interstate power rates filed with FERC or fixed by FERC must be given binding effect by [S]tate utility commissions determining intrastate rates.'") (quoting *Nantahala*, 476 U.S. at 962). *See also Mississippi Power*, 487 U.S. at 371 ("FERC-mandated allocations of power are binding

Such exercises are not uncommon features of retail ratemaking by the States. When setting retail rates, States allow utilities to recover their reasonable expenses. If one of those expenses is set by a federal tariff, the only reasonable amount for the expense is the tariffed rate.

The term "cooperative federalism" has been used by this Court to describe laws relying upon coordinated State and Federal efforts within a complementary administrative framework. See, *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 413 (1973) (*Dublino*). As one of these statutory schemes, the Federal Power Act requires that States implement federal directives, including tariffs approved by the FERC. The mandate to give binding effect to FERC tariffs intrinsically requires States to interpret and apply those tariffs. The Fifth Circuit ignores cooperative federalism, wrongly assuming that State can never be permitted to implement part of that federal scheme.

In *Dublino,* 413 U.S. at 421, this Court stated that where, as here, a State works in tandem with the Federal government ". . . in the pursuit of common purposes, the case for federal pre-emption becomes a *less* persuasive one."

The Fifth Circuit's holding works against the principles of cooperative federalism which the Federal Power Act and numerous other statutes embody. In matters involving electric regulation, there is a constant need for the FERC and State commissions to coordinate. Their consideration of nonjurisdictional matters that are subject

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on the States, and States must treat those allocations as fair and reasonable when determining retail rates.").

to each others' jurisdiction is "commonplace."[11] The "savings clause" in FPA Section 201(b), 16 U.S.C. § 824(b), and other sections of the Act make it clear that Congress intended close cooperation between the FERC and States.[12] Numerous other Acts of Congress also depend upon "cooperative federalism" for their success.[13]

If the Fifth Circuit decision is allowed to stand, it will lead to less coordination between States and the federal government. It will lead to waste of both federal and State resources and potentially inject substantial delay, at ratepayer expense, into the regulatory process. State commissions will be forced to hold any proceeding in which a utility contests the agency's application of the terms of a FERC tariff in abeyance pending the resolution of the underlying construction controversy by FERC. The alternative, and for some State commissioners, perhaps the only alternative,[14] may well be to accede to even nonsensical and/or perverse utility constructions of FERC tariffs.

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[11] See, *e.g., Federal Power Commission v. Conway Corp. et al.*, 426 U.S. 271, 280 (1976).

[12] See, *e.g.*, Sections 202 and 209(b), 16 U.S.C. § 824a and 824h(b).

[13] See, *e.g.*, Sections 1, 3A, 9(b), 11, 13 and 17, 15 U.S.C. §§ 717, 717b-1, 717h(b), 717j, 717l, and 717p of the Natural Gas Act, necessitate close coordination between the FERC and State agencies.

[14] State agencies are already handicapped in their efforts to regulate holding company subsidiaries. State agencies operate with limited staffs and pre-approved budgets. When faced with a tariff violation by a parent company, a State may be unable to pursue a complaint case at the FERC because of the cost and obstacles associated with a FERC proceeding.

CONCLUSION

For the reasons set forth above and the reasons stated in the Petition, *Amicus Curiae* respectfully urges the Court to grant the PUCT's Petition for a Writ of Certiorari.
Dated: June 1, 2007

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